STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 30, 2013
v RODNEY GERARD WILSON, Defendant-Appellant.	No. 300274 Macomb Circuit Court LC No. 2009-005495-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v SOKOL J. GOJCAJ, Defendant-Appellant.	No. 300728 Macomb Circuit Court LC No. 2009-002062-FC

Before: DONOFRIO, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

Defendants Rodney Wilson and Sokol Gojcaj were tried jointly before a single jury, which convicted both defendants of armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a, and assault and battery, MCL 750.81. The trial court sentenced Wilson to concurrent prison terms of 81 to 180 months each for the robbery and conspiracy convictions, and to time served (42 days) for the assault and battery conviction. The court sentenced Gojcaj to concurrent prison terms of 120 to 180 months each for the robbery and conspiracy convictions, and to time served (41 days) for the assault and battery conviction. Each defendant appeals by right. We affirm in both appeals.

Defendants' convictions arise from an October 13, 2008, robbery of the Icon Auto Center, an automotive body repair shop owned by Antoinette Nikprelaj and her husband, Nua Nikprelaj, who were both present during the robbery. Gojcaj, who is Nua's cousin, was also in the shop during the robbery. Two masked men committed the robbery. After the offense,

Antoinette suspected that Gojcaj was involved. A third person, Nikoll Dedvukaj, was also charged in the offense, but he was never arrested because he could not be located.

The testimony at trial indicated that Gojcaj arrived at the shop unexpectedly around 1:00 p.m. and asked the Nikprelajs about their plans for the day, including how long they intended to be at the shop. Gojcaj then left and returned at approximately 5:00 p.m. and stated that he had a friend who would be coming to the shop to get an estimate for some repair work. At 5:30 p.m., the other employees left the shop for the day, leaving just Gojcaj and the Nikprelajs at the shop. While waiting for Gojcaj's friend to arrive, the Nikprelajs observed Gojcaj using his cell phone. Within five minutes after the employees left, two males, one black and one white, entered the shop wearing ski masks and telling the occupants to get down. The robbers assaulted Antoinette and Nua, but not Gojcaj, who urged the victims to give the robbers what they wanted. The robbers focused their efforts on Nua, who had both a gun and a large amount of cash on him. The robbers were able to get away with Nua's cell phone and gun.

After the victims informed the police that they believed that Gojcaj was involved in the offense, the police obtained Gojcaj's cell phone records, which showed that he had made several telephone calls and exchanged several text messages just before the robbery to a telephone number that was registered to defendant Wilson's sister, who was married to Nikoll Dedvukaj. A silver mini-van registered to Wilson's sister also matched a description of the vehicle used in the offense. The prosecution's theory at trial was that the robbery was committed by Dedvukaj and Wilson, with Gojcaj's assistance. During the offense, the black suspect dropped a glove while assaulting one of the victims. DNA obtained from that glove matched Wilson's DNA.

Gojcaj gave a statement to the police in which he admitted participating in the planned robbery. Wilson presented an alibi defense and produced a witness, Tim Nowakowski, who testified that Wilson obtained a tattoo from Nowakowski's tattoo shop in Hamtramck on the date of the offense. Nowakowski recalled that Wilson came into the shop shortly after it opened, which usually was at noon, but it could have been later. The tattoo that Wilson received would have taken 1-1/2 to 2 hours to complete.

I. DOCKET NO. 300274

A. DISCOVERY

Wilson first argues that a new trial is required because the prosecution failed to provide all necessary discovery related to the DNA evidence. Because the record does not support Wilson's claim, we reject this claim of error.

A trial court's decision regarding discovery is reviewed for an abuse of discretion. *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003); MCR 6.201(J). Discovery in a criminal case is governed by MCR 6.201. An expert's opinion, and the underlying basis of that opinion, is subject to mandatory disclosure. MCR 6.201(A)(3) provides in pertinent part:

> [A] party upon request must provide all other parties: . . . (3) the curriculum vitae of an expert the party may call at trial and either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion[.]

Wilson's attorney filed a motion for supplemental discovery of records associated with the DNA testing of the collection of samples obtained by the police. The trial court heard the motion on February 8, 2010. When the case was called more than an hour after it was scheduled for hearing, defense counsel had not yet arrived. The prosecutor indicated he understood the defense motion as requesting the lab reports regarding the DNA testing and independent DNA testing of the tangible evidence (the glove). The prosecutor stated that he had already provided defense counsel with 156 pages of police investigative reports and on January 11, 2010, provided defense counsel with a 14-page crime lab report regarding the DNA testing. Further, the prosecutor stated he would provide the physical evidence for independent DNA testing provided it was done by an accredited lab meeting federal DNA testing quality assurance standards.[1] After defense counsel arrived, the trial court advised him that his motion had been granted subject to independent testing performed by an accredited lab or expert. Defense counsel acknowledged this condition, but indicated he was more interested "with paperwork" and was not even sure that he wanted independent testing of the glove.

In May 2010, Wilson filed another motion for supplemental discovery. The trial court heard this motion on June 7, 2010. At this hearing, defense counsel stated he did not want to have independent DNA testing completed on the glove. Rather, defense counsel asserted that he had not received "background material" regarding the DNA testing. The prosecutor responded that he had provided defense counsel everything required by statute and court rule. On specific inquiry by the court, the prosecutor twice affirmed that he had provided defense counsel with everything that he had in his file regarding the DNA testing. In response, defense counsel stated, "I'm not arguing that [the prosecutor] has not given me everything he has in his file as relates to the DNA, but what I'm asking is that he go beyond that" and provide unspecified material that the crime lab maintains. The trial court ruled it would not provide defense counsel "carte blanche" nor order the prosecutor to provide defense counsel more than what the prosecutor possessed "in the standard course of business[.]" The prosecutor stated that he had offered several times to allow defense counsel to review the prosecutor's file so that counsel could verify discovery was complete, but counsel had cancelled several appointments and failed to appear for another. The trial court determined that Wilson had been provided with all required discovery and denied his motion for further relief. In light of this record, we find no basis for concluding that the prosecutor failed to comply with the trial court's discovery order. We also conclude that the trial court did not abuse its discretion denying Wilson further relief.

Although Wilson asserts on appeal that he was not provided with all necessary materials for the benefit of his own DNA expert, Wilson's attorney specifically denied that he intended to use his own DNA expert or subject any materials to new testing. We decline to consider the affidavits from trial counsel and Wilson's expert witness that Wilson has submitted on appeal. These documents were not submitted below, and enlargement of the record on appeal is not permitted. *People v Eccles*, 260 Mich App 379, 384 n 4; 677 NW2d 76 (2004). Furthermore,

[1] The prosecutor expressed concern regarding the DNA expert the defense had retained, a former State Police crime lab employee who was not accredited and, according to the prosecutor, harbored animus against her former employers.

the affidavits do not identify with specificity any discovery materials that were not produced. Wilson has failed to establish a violation of his right to discovery.

Wilson also presented these same affidavits in a motion to remand for an evidentiary hearing on this issue. Wilson contends the disclosure on the lab reports provided to the defense is evidence that the prosecutor withheld requested discovery materials. The DNA lab reports state: "The relevant supporting data upon which the expert opinion or inference was made are available for review/inspection." The disclosure, however, demonstrates neither that the prosecutor falsely represented that he provided the defense with copies of his complete file nor that the trial court abused its discretion denying Wilson's motion for further discovery.[2] Rather, it establishes that any additional material regarding the DNA testing was maintained at the crime lab, a fact of which defense counsel was on notice at least five months before trial that it was "available for review/inspection." Indeed, if the crime lab possessed additional material, defense counsel could have required its production at trial by subpoena. Moreover, Wilson's argument that defense counsel was precluded from cross-examining the prosecution's DNA witness regarding compliance with protocol, chain of custody, or analytical errors is without merit as such questioning could have been pursued without production of the alleged missing material.

Wilson also argues that the trial court erred by failing to grant a continuance to remedy the discovery violations. Wilson did not request a continuance in the trial court, and a trial court does not abuse its discretion in failing to grant a continuance in the absence of a request. *People v McCrady*, 213 Mich App 474, 481; 540 NW2d 718 (1995). In any event, because the trial court had previously determined that all required discovery had been provided, and Wilson was unable to identify a need for additional discovery, we find no merit to this argument.

In sum, Wilson has failed to establish either a discovery violation and that his ability to cross-examine the prosecution's expert witness was hindered by the lack of discovery. Wilson fails to explain how his cross-examination would have been different had he had access to additional unspecified documentation related to the DNA testing and results. Thus, there is no merit to this argument.

Wilson also argues that defense counsel was ineffective in conducting discovery because (1) counsel did not articulate what documents he needed in discovery for effective cross-examination; (2) counsel's cross-examination of the prosecution's DNA expert was not effective, and (3) counsel should have requested a continuance to obtain necessary records before the prosecution's expert was cross-examined.

To establish ineffective assistance of counsel, Wilson must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced Wilson that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Wilson must overcome the presumption that the challenged action might be

[2] The disclosure also fails to demonstrate the need to remand for an evidentiary hearing.

considered sound trial strategy. *Id*. To establish prejudice, Wilson must show that there is a reasonable probability that but for counsel's error, the result of the proceeding would have been different. *Id*. at 302-303.

Here, Wilson has not identified what information he believes should have been produced and was not, explained how counsel's cross-examination was deficient, or identified the necessity for a continuance. Accordingly, his ineffective assistance of counsel claim fails.

B. ALIBI DEFENSE

Wilson next argues that the trial court erred in allowing the prosecutor to introduce into evidence Wilson's notice of alibi defense and the trial court's register of actions. The prosecutor introduced this evidence to discredit Wilson's alibi defense by showing that the defense was not timely asserted. Although defense counsel initially objected to this evidence, he eventually stipulated to its admission. By stipulating to the evidence, defense counsel waived any claim of evidentiary error, leaving no error to review. *People v Eisen*, 296 Mich App 326, 328-329; 820 NW2d 229 (2012). Therefore, our review of this issue is limited to Wilson's claim that defense counsel was ineffective for stipulating to the evidence.

In *People v Gray*, 466 Mich 44, 48; 642 NW2d 660 (2002), our Supreme Court held that "[a] tardily raised or incredible claim of alibi may be challenged as part of the truth-seeking process that is a criminal trial." Thus, "[w]here a defendant puts forth an alibi defense, that defense can be challenged by . . . unexplained delays in its assertion[.]" *Id.* Here, the challenged evidence was offered to show Wilson's delay in asserting an alibi defense. Under *Gray*, evidence of Wilson's delay in asserting an alibi defense was admissible to challenge the credibility of that defense. Therefore, defense counsel cannot be deemed ineffective for stipulating to that evidence. Moreover, counsel appropriately sought to mitigate any prejudice to Wilson by requesting a special instruction advising the jury that the notice was filed pursuant to statute and by arguing in closing argument that he (counsel) was responsible for the delay in filing the notice of alibi. This was an objectively reasonable strategy to minimize any damaging effect from otherwise admissible evidence. To the extent that counsel's performance could be deemed deficient because counsel did not request that unnecessary portions of the register of actions be redacted as irrelevant, there is no reasonable probability that any irrelevant information in the register of actions affected the outcome of the trial. Accordingly, the record does not support Wilson's claim of ineffective assistance of counsel.

C. REBUTTAL TESTIMONY

Wilson next argues that the officer in charge was improperly permitted to testify as a rebuttal alibi witness when the prosecution never filed a proper notice of rebuttal as required by MCL 768.20(2). Because Wilson did not object to the officer's rebuttal testimony, this issue is unpreserved and our review is limited to plain error affecting Wilson's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The intent behind the rebuttal notice requirement in MCL 768.20 is to prevent surprise at trial. *People v Bell*, 169 Mich App 306, 308; 425 NW2d 537 (1988). Where the necessary

statutory notice is not filed, a trial court retains discretion to admit rebuttal testimony where, under the circumstances, there exists good cause for excusing the failure to timely comply with the statutory disclosure requirements. *People v Travis*, 443 Mich 668, 678-680; 505 NW2d 563 (1993); *Bell*, 169 Mich App at 309. Further, the notice requirement in MCL 768.20(2) does not apply where the witness is called to impeach an alibi witness rather than to contradict the actual alibi testimony given. *People v Khabar*, 126 Mich App 138, 141-142; 337 NW2d 9 (1983); *People v Gillman*, 66 Mich App 419, 425-429; 239 NW2d 396 (1976). We agree with plaintiff's position that the officer in charge was not called to rebut the alibi defense but only to impeach the alibi witness's testimony. Therefore, the officer's testimony was not plain error. Because the testimony was not improper, we also reject Wilson's related claim that defense counsel was ineffective for failing to object to the testimony. Counsel was not required to make a meritless objection. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

D. EXPERT TESTIMONY

Wilson next argues that the trial court erred by permitting the officer in charge to offer his opinion regarding the alibi witness's degree of cooperation with the investigation. The court reasoned that the testimony was proper expert testimony. We review the trial court's decision for an abuse of discretion. *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003).

Initially, we disagree with Wilson's argument that the officer's testimony was improper opinion testimony regarding the credibility of another witness. See *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). The testimony did not involve a direct comment on Nowakowski's credibility. The prosecutor only asked whether Nowakowski was cooperative during the police investigation. We agree with Wilson, however, that the trial court erred in determining that the testimony was proper expert testimony, given that the officer was not testifying as an expert and no foundation for the officer to offer his opinion as an expert was established. Nevertheless, any error was harmless because the officer's opinion testimony was admissible as lay opinion testimony under MRE 701, which permits lay witnesses to offer opinion testimony if the testimony is (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. MRE 701 permits police officers to testify about their opinions and inferences based on their observations and rational perceptions as police officers where the opinions are not dependent upon scientific, technical, or specialized knowledge. *People v Oliver*, 170 Mich App 38, 49-50; 427 NW2d 898 (1988), modified on other grounds 433 Mich 862 (1989). Here, the officer's testimony was based on his observations and perceptions of Nowakowski's degree of cooperation with the police investigation and thus was admissible under MRE 701.

Relying on *United States v Lopez-Medina*, 461 F3d 724, 743-745 (CA 6, 2006), Wilson also argues that the trial court erred by not giving a special jury instruction explaining how the officer's testimony should be considered. We disagree. Wilson's reliance on *Lopez-Medina* is misplaced because that case involved a police officer who testified as both a fact and expert witness. Here, the officer offered brief lay opinion testimony, but he was solely a fact witness. Therefore, a special instruction was not required.

E. ALIBI WITNESS'S PRIOR RECORD

Wilson next argues that the trial court erred when it allowed the prosecution to introduce evidence that Nowakowski, his alibi witness, was prosecuted for a prior criminal matter by the same prosecutor's office that was prosecuting the charges for the present case. The prosecutor offered the evidence to show Nowakowski's bias in testifying. Because Wilson's attorney expressly stipulated to this evidence, any claim of evidentiary error has been waived, and thus is not subject to review. *Eisen*, 296 Mich App at 328-329. Accordingly, our review of this issue is limited to Wilson's claim that defense counsel was ineffective for stipulating to the evidence.

Our Supreme Court has recognized that a witness may be cross-examined with regard to prior convictions or arrests to show the witness's interest or bias in testifying. *People v Layher*, 464 Mich 756, 758, 765 n 5, 768; 631 NW2d 281 (2001); see also MCL 600.2158, MCL 600.2159. Here, the prosecutor offered the evidence of Nowakowski's prior contact with the police department and prosecution by the same prosecutor's office involved in this case to show his bias as a witness, which is a proper subject of cross-examination; therefore, defense counsel was not ineffective for stipulating to the evidence. Moreover, Wilson concedes that its admission into evidence was inevitable. Accordingly, Wilson has not overcome the strong presumption that counsel stipulated to the evidence as a matter of sound trial strategy. The stipulation allowed counsel to maintain some control over what information the jury would hear, minimize its effect, and avoid potentially harmful surprises.

F. PROSECUTORIAL MISCONDUCT

Wilson next argues that prosecutorial misconduct denied him a fair trial. Because Wilson did not object to the prosecutor's conduct at trial, his claims of prosecutorial misconduct are not preserved. Accordingly, we review the claims for plain error affecting Wilson's substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). Reversal is not warranted if a cautionary instruction could have cured any prejudice resulting from the prosecutor's remarks. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Claims of prosecutorial misconduct are decided case by case, and the challenged comments must be read in context to determine whether the defendant was denied a fair trial. *McLaughlin*, 258 Mich App at 644. A prosecutor is afforded great latitude during closing arguments. The prosecutor is permitted to argue the evidence and make reasonable inferences arising from the evidence in support of his theory of the case, but he must refrain from making arguments based on fear or prejudice or personal opinion. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). While prosecutors have a duty to provide a defendant a fair trial, they may use "hard language" when the evidence supports it, and they are not required to phrase their arguments in the blandest of terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). "A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence." *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003).

Wilson primarily argues that the prosecutor made several arguments that were not supported by the evidence. He principally asserts that it was never proven that Dedvukaj was the second robber, along with Wilson. As explained above, however, the prosecutor was free to make reasonable inferences drawn from the evidence in support of his theory of the case. Here, there was evidence that Wilson was one of two masked men who committed the robbery. The evidence also indicated that Wilson frequently associated with Dedvukaj, who was his brother-in-law, and that a silver mini-van registered to Dedvukaj's wife, matched the description of the vehicle used in the offense. It was not unreasonable for the prosecutor to infer from this evidence that Dedvukaj was the second robber.

Wilson also argues that it was improper for the prosecutor to argue that Wilson fit the description of one of the robbers because the victims provided only a vague description of that individual. Regardless of whether the victims' descriptions are accurately described as vague, the prosecutor may still properly argue from that evidence that Wilson fit the descriptions. Ultimately, the weight of the victims' descriptions and whether Wilson's appearance was similar, were matters for the jury to decide, but that did not prohibit the prosecutor's argument.

Wilson next contends that it was improper for the prosecutor to attribute unknown female DNA found on a Styrofoam cup to the government agent who collected Wilson's DNA sample. We disagree. The prosecutor's statement was a reasonable inference drawn from the agent's testimony that she handled the cup when she collected Wilson's DNA. Wilson also argues that it was improper for the prosecutor to speculate that unknown DNA found on the glove recovered at the crime scene came from Antoinette. Again, this was a reasonable inference drawn from the evidence of the offense, during which Antoinette was assaulted by a robber wearing a glove.

Wilson also argues that it was improper for the prosecutor to suggest to the jury that a photograph of Wilson's tattoo, which contained the same date as the charged offense, might have actually been a photograph of an original photograph of the tattoo, taken by a camera on which the date had been altered. The prosecutor's argument was based on details of the photograph, including a glare that suggested that it was a photograph of another photograph. The prosecutor's argument was a permissible inference drawn from the evidence. Further, the photograph was shown to the jury, which ultimately could determine for itself whether there was any support for the prosecutor's argument.

Wilson also argues that it was improper for the prosecutor to offer into evidence the alibi notice, the register of actions, and the opinion testimony from the officer in charge. We have already determined that there was no error in admitting any of this evidence. Regardless, prosecutorial misconduct may not be predicated on good-faith efforts to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Thus, the prosecutor's efforts to admit this evidence cannot be considered misconduct.

Last, because Wilson has not shown any misconduct by the prosecutor, his related claim that defense counsel was ineffective for failing to object to the prosecutor's conduct cannot succeed. Counsel is not required to make a futile objection. *Darden*, 230 Mich App at 605.

G. CUMULATIVE ERROR

Because Wilson has not established any actual errors at trial, his claim that reversal is required due to the cumulative effect of multiple errors cannot succeed. *People v LeBlanc*, 465 Mich 575, 591, n 12; 640 NW2d 246 (2002).

H. SENTENCING

Wilson argues that he is entitled to resentencing because the trial court erred in scoring 15 points for offense variable (OV) 10. We disagree.

When scoring the sentencing guidelines, the trial court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). "Scoring decisions for which there is any evidence in support will be upheld." *Id*. When challenged, a sentencing factor need only be proven by a preponderance of the evidence, *People v Wiggins*, 289 Mich App 126, 128; 795 NW2d 232 (2010), and the trial court may rely on reasonable inferences arising from any evidence in the record to support the scoring of an offense variable. *People v Johnson*, 298 Mich App 128, 131; 826 NW2d 170 (2012). The construction or application of the sentencing guidelines are questions of law reviewed de novo. *Wiggins*, 289 Mich App at 128.

MCL 777.40(1)(a) provides that 15 points are to be scored for OV 10 for exploitation of a vulnerable victim if predatory conduct was involved. "Predatory conduct" is defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). Predatory conduct must have occurred before the commission of the offense, *People v Cannon*, 481 Mich 152, 160; 749 NW2d 257 (2008), but need not be directed at "the victim" in particular, but can extend to conduct directed at "a victim." *People v Huston*, 489 Mich 451, 458-459; 802 NW2d 261 (2011). In *Huston*, 489 Mich at 460-461, the Court explained that in order to find that there was predatory conduct directed at a victim, the sentencing court is not required to find that the victim was vulnerable beforehand:

> [The effect on the community at large] explains why the Legislature chose to assess 15 points for "predatory conduct," the highest number of points that can be assessed under OV 10. The hierarchical range of points that may be assessed under OV 10 extends from zero to 15 points. Zero points are to be assessed when "[t]he offender did not exploit a victim's vulnerability." MCL 777.40(1)(d). Five points are to be assessed when "[t]he offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious"—things that are largely within the victim's own control. MCL 777.40(1)(c). Ten points are to be assessed when "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status"—things that are largely outside of the victim's control. MCL 777.40(1)(b). Finally, 15 points are to be assessed when "[p]redatory conduct was involved"—something that is *always* outside of the victim's control

> and something that may impact the community as a whole and not only persons with already-existing vulnerabilities. That is, we can only interpret the Legislature's hierarchical approach in OV 10 as indicating its own view that "predatory conduct" deserves to be treated as the *most serious* of all exploitations of vulnerability because that conduct itself created or enhanced the vulnerability in the first place, and it may have done so with regard to the community as a whole, not merely with regard to persons who were *already* vulnerable for one reason or another. By its essential nature, predatory conduct may render *all* persons uniquely susceptible to criminal exploitation and transform all persons into potentially "vulnerable" victims. Only in this way can MCL 777.40(1)(a) be understood as connected with MCL 777.40(1)(b) through (d). [Footnote omitted.]

Thus, scoring for predatory conduct can be based on conduct that would make any victim vulnerable, and the trial court need not find that the victim was susceptible or vulnerable beforehand. Considering this basis, we conclude Wilson's challenge to the scoring of OV 10 must fail. The evidence showed that Gojcaj orchestrated the offense by making contact with the victims to ensure that at least Nua would be at the shop at closing time by fabricating a story about bringing in his friend for an estimate. Further, Gojcaj communicated with Wilson to coordinate the time of the offense to ensure that it was committed after the other employees had left, leaving Nuka and Antoinette alone in the shop and more vulnerable to a robbery. While Wilson argues that only Gojcaj engaged in predatory conduct, the jury found that Wilson was guilty of conspiracy to commit armed robbery. This also supports the trial court's scoring of OV 10 for Wilson because of Wilson's complicity in the preoffense conduct. Accordingly, the trial court did not err in scoring 15 points for OV 10.

II. DOCKET NO. 300728

A. SEARCH WARRANTS

Gojcaj argues that his attorney was ineffective for not moving to suppress the telephone records which were obtained pursuant to two search warrants served on Gojcaj's cell phone carrier at the carrier's Texas office. Gojcaj primarily argues that the telephone records should have been suppressed because the magistrate who issued the two search warrants lacked jurisdiction to issue warrants pertaining to an out-of-state party.

The Fourth Amendment protects against unreasonable searches and seizures and requires the use of a warrant issued by a magistrate based on probable cause. *People v Taylor*, 253 Mich App 399, 403-404; 655 NW2d 291 (2002). Here, the police treated the cell phone records as protected by the Fourth Amendment and obtained search warrants from a magistrate.

Gojcaj argues that the magistrate lacked jurisdiction to issue the search warrants because they were directed at Metro PCS's subpoena compliance office, which is located in Richardson, Texas. This Court has recognized that a magistrate's authority to issue a search warrant extends statewide. *People v Fiorillo*, 195 Mich App 701, 704; 491 NW2d 281 (1992). Gojcaj relies on *State v Jacob*, 185 Ohio App 3d 408; 924 NE2d 410 (2009), to argue that the magistrate lacked jurisdiction to issue the warrants for records in Texas. We conclude that *Jacob* is distinguishable. In that case, the defendant, who resided in California, was charged under Ohio

law with theft from an elderly person when the defendant agreed to sell figurines for the victim on the Internet. Police in Ohio obtained a search warrant from the local court to search a residence in California. The warrant was executed by a member of the San Francisco Police Department and led to the discovery of evidence that connected the defendant to the offense in Ohio. The defendant was arrested in California and extradited to Ohio. Later, the police obtained another search warrant for electronic devices that had been seized at the defendant's home and transferred to Ohio. *Id*. at 410. The defendant challenged the validity of the California search on the grounds that the supporting affidavit did not establish probable cause for the search and that the warrant was unlawfully executed in California. The Ohio Court of Appeals concluded that the search warrant violated the defendant's Fourth Amendment rights.

Although *Jacob* holds that one state court should not subject citizens of another state to its laws on search and seizure, this case is clearly distinguishable because it does not involve the search of a residence and seizure of physical property located in another state. The evidence obtained from Metro PCS in Texas involved only records of electronic communications that occurred in Michigan, not Texas. Even though the warrants were served on a party at its office outside this state, they solely concerned transactions that occurred within this state. Thus, *Jacob* does not support Gojcaj's argument that the magistrate lacked the authority to issue the warrants.

Gojcaj also argues that probable cause to issue the search warrants was lacking. We disagree. Probable cause to search must exist at the time a warrant is issued. *People v Stumpf*, 196 Mich App 218, 227; 492 NW2d 795 (1992). "Probable cause exists when a person of reasonable caution would be justified in concluding that evidence of criminal conduct could be found in a stated place to be searched." *Id*. When reviewing a decision to issue a search warrant, the reviewing court must read the search warrant and the affidavit in a common-sense and realistic manner. *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992). A reviewing court must accord deference to the magistrate's decision, asking only if there is a substantial basis for the magistrate's conclusion that there is a fair probability that contraband or evidence of a crime will be found in a particular place before issuing the warrant. *Id* at 603-604.

The affidavits submitted in support of the search warrants described the robbery committed by two suspects, indicated that Antoinette Nikprelaj had informed the officer that she believed that Gojcaj, who was present during the robbery, was involved, and related how Gojcaj had arrived unexpectedly at the shop on the day of the offense and told the victims about a new female customer to keep them at the shop. These facts informed the magistrate that the offense was committed by two men with the suspected aid of Gojcaj, an insider who had arrived unexpectedly at the shop and attempted to keep the victims there as long as possible. The evidence of coordinated activity among three participants provide a substantial basis for concluding that the cell phone records would contain evidence of communications between the robbers and Gojcaj, the inside suspect. Thus, the warrants were properly issued.

In light of the foregoing, Gojcaj has not shown that defense counsel was ineffective for failing to challenge the validity of the search warrants. Any motion to suppress would have been futile. *Darden*, 230 Mich App at 605.

B. SENTENCING

Gojcaj also argues that the trial court erred in scoring 15 points for OV 10 of the sentencing guidelines. Our analysis of this issue with respect to defendant Wilson in part I(H) of this opinion applies equally to defendant Gojcaj. The evidence showed that Gojcaj orchestrated the offense by making contact with the victims to ensure that at least Nua would be at the shop at closing time and that Gojcaj fabricated a story about having a friend come in for an estimate so that Nua would remain at the shop after hours. Further, Gojcaj communicated with Wilson to coordinate the time of the offense to ensure that it was committed after the other employees had left leaving Nua and Antoinette would be alone in the shop and hence more vulnerable to a robbery. This evidence supports the trial court's 15-point score for OV 10.

We affirm.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Donald S. Owens